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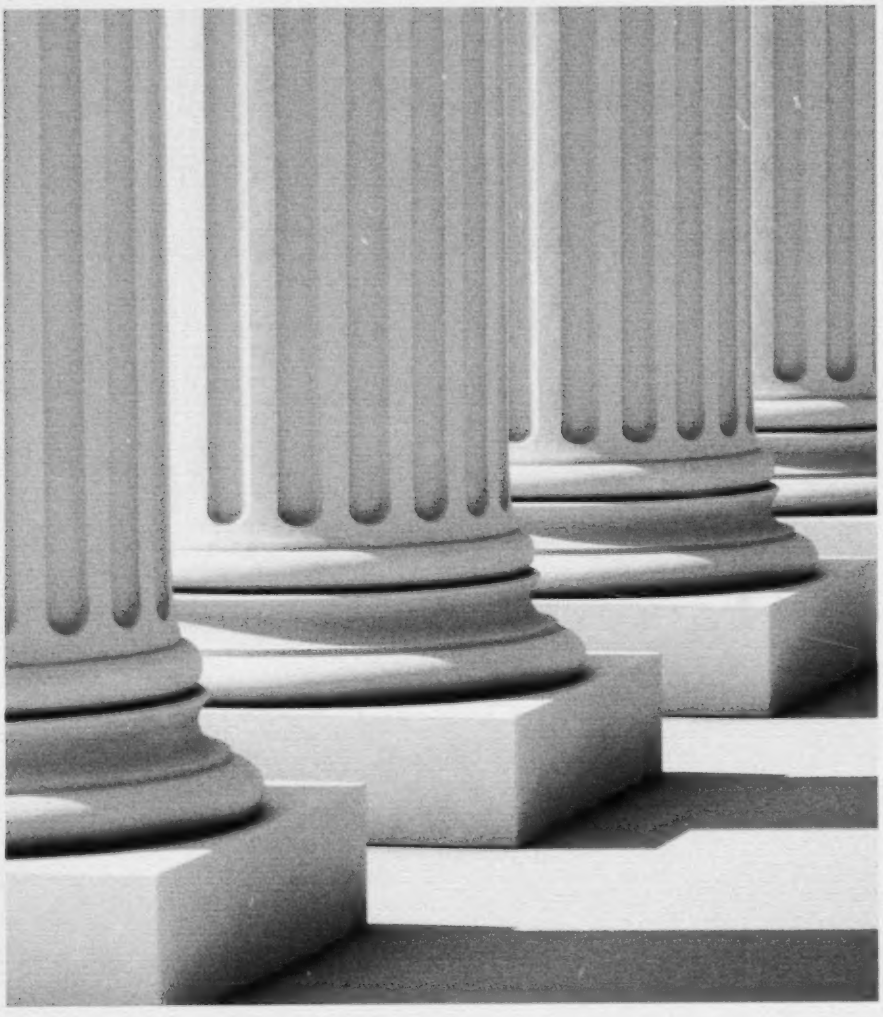
MATRIMONIAL PROPERTY ACT: VALUATION DATE



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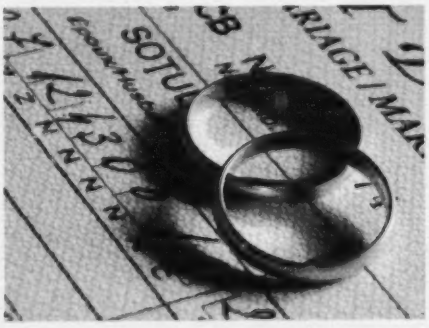

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FINAL REPORT **107**

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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The legal research and analysis that forms the foundation of this report was conducted by Shannon Brochu, Counsel, and Elizabeth Robertson, Counsel. The writing and preparation of the consultation documents were done by Shannon Brochu, Sandra Petersson, Research Manager, and Katherine MacKenzie, Research Associate. Katherine MacKenzie wrote the final report. Student assistance was provided by Kathryn Griffin. Barry Chung developed and provided technological support for the online survey. The report was prepared for publication by Ilze Hobin.

Summary

The date at which matrimonial property is valued has a significant impact on the overall matrimonial property settlement. While the *Matrimonial Property Act* ["MPA"] does not specify a valuation date, in 2005 the Alberta Court of Appeal established that the MPA requires matrimonial property to be valued as of the date of trial. Alberta case law since 2005 demonstrates that valuing property as at the date of trial is problematic.

It is expected that most parties will settle matrimonial property disputes without a trial. Valuation as at the date of trial assumes that parties will litigate their disputes and, as a result, is inconsistent with a settlement-focused approach to property division. Updates to the MPA would resolve difficulties with the current approach to valuation date.

This report makes recommendations in several areas.

Agreed valuation date

First, the MPA should expressly provide that spouses may agree on a valuation date. This possibility is already implicit in the MPA. Making it explicit would serve an educational purpose for parties, and may encourage agreement. A related provision should state the formalities required for an agreement on valuation date. The formalities should be essentially the same as required for any agreement on matrimonial property, with a minor exception due to the nature of the agreement.

Default valuation date

Second, the MPA should include a default valuation date to apply when parties do not agree. For a number of reasons, valuation at the date of separation is preferable to the date of trial. For example, if property is valued as at the date of trial, it is difficult to determine the value of the property in advance. This may make it difficult to conduct meaningful settlement discussions because parties must assume valuation at an uncertain future date. Uncertainty can make it difficult for lawyers to advise their clients and for parties to reach agreement on division. Further, as cases proceed towards trial, parties must often obtain updated property appraisals. Repeated appraisals drive up the cost of litigation and can cause delays. In contrast, valuing matrimonial property as at the date of separation should facilitate settlement, reduce cost and delay, and allow decisions to be made on the basis of more accurate information. This report therefore recommends that the MPA should expressly provide that, if parties do not agree, matrimonial property should be valued as at the date of separation.

Post-valuation changes

Finally, there will be circumstances where significant changes occur following valuation but prior to distribution. Section 8 of the MPA contains factors a court may consider in making a distribution of property. Section 8 provides flexibility to respond to changes to post-valuation changes to property, but it would be desirable to add an additional factor addressing changes in the value of property between valuation and distribution. Therefore, this report recommends that flexibility to respond to post-valuation changes can best be achieved through recourse to the factors found in section 8 of the MPA. However, to reflect separation as the default valuation date, the section 8 factors should be adjusted to allow consideration of any post-valuation changes in value and the circumstances of the change.

Recommendations

RECOMMENDATION 1
The *Matrimonial Property Act* should expressly provide that spouses may agree on a valuation date. 15

RECOMMENDATION 2
Before executing an agreement regarding valuation date, spouses should be required to obtain independent legal advice as outlined in section 38 of the *Matrimonial Property Act*. 16

RECOMMENDATION 3
Section 38(1)(b) of the *Matrimonial Property* Act regarding future claims should not apply to agreements confined to valuation date. 16

RECOMMENDATION 4
If spouses do not agree on a valuation date, the *Matrimonial Property Act* should expressly provide that the default valuation date will be the date on which the parties begin to live separate and apart 29

RECOMMENDATION 5
The proposed amendments to the *Matrimonial Property Act* should come into force on Proclamation. 31

RECOMMENDATION 6
Valuation as at the date of trial should continue to govern couples who have set their matter down for trial before the amendments come into force 31

RECOMMENDATION 7
Flexibility to respond to post-valuation property changes is best achieved by applying the factors in section 8 of *the Matrimonial Property Act*..... 38

RECOMMENDATION 8
Section 8 of the *Matrimonial Property Act* should be amended to include a factor that addresses whether there has been any substantial change in the value of matrimonial property following the date on which the spouses began to live separate and apart and the circumstances of that change 42

RECOMMENDATION 9
Section 8(d) of the *Matrimonial Property Act* should be amended to eliminate any reference to a specific date. 43

RECOMMENDATION 10
Section 8(d) of the *Matrimonial Property Act* should allow the Court to consider the income, earning capacity, liabilities, obligations, property, and other financial resources that each spouse has at any time during the relationship. 43

Table of Abbreviations

	LEGISLATION
BC Act	*Family Law Act*, SBC 2011, c 25
Manitoba Act	*Family Property Act*, CCSM, c F25
MPA	*Matrimonial Property Act*, RSA 2000, c M-8
Ontario Act	*Family Law Act*, RSO 1990, c F.3
PEI Act	*Family Law Act*, RSPEI 1988, c F-2.1
Saskatchewan Act	*The Family Property Act*, SS 1997, c F-6.3
Yukon Act	*Family Property and Support Act*, RSY 2002, c 83
	CASES
Hodgson	*Hodgson v Hodgson*, 2005 ABCA 13
	LAW REFORM PUBLICATIONS
Background Paper	Alberta Law Reform Institute, *Matrimonial Property Legislation: Valuation Dates*, Background Paper (2005)
Saskatchewan Report 1985	*Proposals Relating to Matrimonial Property Legislation*, Report (1985)
Saskatchewan Report 1996	Law Reform Commission of Saskatchewan, *The Matrimonial Property Act: Selected Topics*, Report (1996)
Ontario Report	Law Reform Commission of Ontario, *Report on Family Property Law*, Final Report (1993)

CHAPTER 1

Introduction

A. Background

[1] The *Matrimonial Property Act* [MPA] was enacted in 1978.[1] Since then, the *Divorce Act* has undergone significant reform. It is now easier for spouses to end a marriage and to do so without a court finding of fault.[2] There have also been significant changes to the economic, political, and social attitudes and expectations regarding the distribution of property between spouses on marriage breakdown. Changes in the culture of litigation and an increased emphasis on settlement and party controlled dispute resolution have reduced the need to rely on court adjudication in many cases. Despite these significant changes, the MPA has been largely unchanged during the last 35 years.

[2] In 2005, ALRI produced a background paper entitled *Matrimonial Property Legislation: Valuation Dates* [Background Paper].[3] That paper considered whether the then recent Court of Appeal decision in *Hodgson v Hodgson* charted an appropriate path for Alberta in setting trial as the valuation date for matrimonial property division.[4] While the MPA does not expressly set out a valuation date, the Court of Appeal found that, by implication, various components of the MPA pointed to the date of trial. However, before *Hodgson*, valuation at trial was seen to encourage delay and discourage settlement in many instances. The Background Paper and concurrent focus groups highlighted the implications of retaining trial over separation and other options. Given the recency of *Hodgson* in 2005, it seemed appropriate to take a wait-and-see approach to observe whether the implied valuation date worked well in practice.

[3] In 2010, ALRI funded a case law review carried out by Professor Jonette Watson Hamilton and Annie Voss-Altman of the University of Calgary.[5] The review looked at ten years of case law under the MPA to determine where the

---

[1] *Matrimonial Property Act*, RSA 2000, c M-8 [MPA].

[2] *Divorce Act*, RSC 1985, c 3 (2nd Supp).

[3] Alberta Law Reform Institute, *Matrimonial Property Legislation: Valuation Dates*, Background Paper (2005), online: <www.alri.ualberta.ca/docs/bpMPA.pdf> [Background Paper].

[4] *Hodgson v Hodgson*, 2005 ABCA 13 [*Hodgson*].

[5] Jonette Watson Hamilton & Annie Voss-Altman, *The Matrimonial Property Act: A Case Law Review*, Research Paper (2010), online: Alberta Law Reform Institute <www.alri.ualberta.ca/docs/OP MPA Case Law.pdf>.

Act was problematic. While the review turned up many areas of concern, one of the areas that was most troublesome was valuation date.

B. Property Division under the *Matrimonial Property Act*

[4] Section 7 of the MPA governs the distribution of all property owned by both spouses and by each of them.[6] The right to divide this property arises on divorce, nullity of marriage, judicial separation, a declaration of irreconcilability, separation for at least a year, or separation accompanied by dissipation or improper transfers or gifting of property as provided in section 5.

[5] The Court of Appeal of Alberta has described the underlying purpose of the MPA as a means to "legally recognise marriage as an economic partnership, founded on the presumption that the Parties intend to share the fruits of their labour during and as a result of it, on an equal basis."[7]

[6] This presumption of equal sharing is articulated in section 7(4) of the MPA for the division of property acquired during the marriage:

> **Distribution of property**
>
> **7(4)** If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

[7] As indicated in section 7(4), the presumption of equal sharing does not apply to the division of property referred to in sections 7(2) and (3). Section 7(2) specifies types of property that are exempt from equal sharing.[8] Section 7(3)

---

[6] MPA, s 7(1).

[7] *Jensen v Jensen*, 2009 ABCA 272 at para 1.

[8] The MPA provides:

> **Distribution of property**
>
> **7(2)** If the property is
>
> (a) property acquired by a spouse by gift from a third party,
>
> (b) property acquired by a spouse by inheritance,
>
> (c) property acquired by a spouse before the marriage,
>
> (d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
>
> (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,
>
> the market value of that property at the time of marriage or on the date on which the property was acquired by the spouse, whichever is later, is exempted from a distribution under this section.

gives the court discretion to divide other types of property in a just and equitable manner, including increases in the value of exempt property.[9]

[8] As noted, the section 7(4) presumption of equal sharing may be displaced if the court concludes that equal division would be unjust or inequitable. When matrimonial property is not shared equally as per section 7(3) or (4), the court must consider thirteen factors set out in section 8 of the MPA.[10] There is no express formula for applying these factors.[11]

---

[9] The MPA provides:

Distribution of property

7(3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:

(a) the difference between the exempted value of property described in subsection (2), referred to in this subsection as the "original property", and the market value at the time of the trial of the original property or property acquired

(i) as a result of an exchange for the original property, or

(ii) from the proceeds, whether direct or indirect, of a disposition of the original property;

(b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);

(c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage, a judgment of judicial separation or a declaration of irreconcilability under the *Family Law Act* is made in respect of the spouses;

(d) property acquired by a spouse by gift from the other spouse.

[10] The MPA provides:

Matters to be considered

8 The matters to be taken into consideration in making a distribution under section 7 are the following:

(a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

(b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;

(c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;

(d) the income, earning capacity, liabilities, obligations, property and other financial resources

(i) that each spouse had at the time of marriage, and

(ii) that each spouse has at the time of the trial;

(e) the duration of the marriage;

(f) whether the property was acquired when the spouses were living separate and apart;

(g) the terms of an oral or written agreement between the spouses;

(h) that a spouse has made

(i) a substantial gift of property to a third party, or

(ii) a transfer of property to a third party other than a bona fide purchaser for value;

(i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;

(j) a prior order made by a court;

(k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;

(l) that a spouse has dissipated property to the detriment of the other spouse;

(m) any fact or circumstance that is relevant.

[11] See *Jensen v Jensen*, 2009 ABCA 272 at para 18.

[9] The Alberta Court of Appeal has outlined a four-step process for the division of matrimonial property under the MPA.[12] The first step involves determining all of the property that the spouses own at the date of trial. Second, any property that is exempt under section 7(2) should be identified and its market value should be excluded from distribution. Third, property subject to section 7(3) should be identified and distributed between the spouses in a manner that is just and equitable. The division of this property is within the discretion of the trial judge, taking into account the factors in section 8. It is not subject to a presumption of equal sharing. Lastly, the remaining assets should be divided equally, unless an equal division would not be just and equitable after considering the factors outlined in section 8.

C. Consultation Process

[10] ALRI solicited feedback on the issues associated with valuation date in multiple ways. In November 2013, ALRI had an opportunity to discuss valuation dates with practitioners attending matrimonial property seminars held by the Legal Education Society of Alberta (LESA) in both Edmonton and Calgary. In May 2014, ALRI facilitated similar discussions with practitioners attending a matrimonial property seminar hosted by the Central Alberta Bar Society in Red Deer.

[11] In November and December 2014, ALRI attended Family Law Section meetings hosted by the Canadian Bar Association in both Edmonton and Calgary. Attendance at these meetings provided ALRI an opportunity to present the issues and recommendations put forth in *The Matrimonial Property Act: Valuation Date*, Report for Discussion 25.[13] Section members offered opinions and insights on the recommendations, which were carefully recorded and considered by ALRI.

[12] In December 2014, ALRI formally published the Report for Discussion. Following publication, ALRI conducted an online survey to gather further feedback on the recommendations. There were three survey questions, with each question corresponding to a recommendation in the Report for Discussion. Participants were asked to select a tick-box as their primary answer to the survey

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[12] *Hodgson* at paras 19–24.

[13] Alberta Law Reform Institute, *The Matrimonial Property Act: Valuation Date*, Report for Discussion 25 (2014) [Report for Discussion].

question, and were also given an opportunity to provide additional comments in a text box below. Eighty-one people participated in the survey and it is reasonable to assume that the majority of respondents were lawyers.

Finally, ALRI also received eleven independent submissions (i.e., letters, emails etc.) from family law practitioners who provided written feedback on the proposed recommendations. All consultation comments and results were carefully considered during the preparation of this Report.

CHAPTER 2

Valuation Date

[13] The valuation date is when matrimonial property is valued for the purposes of division between the spouses. It serves as a cut-off date for determining the property from the marriage that is to be shared. The valuation date has also been conceptualized as the "date on which the economic partnership between the spouses comes to an end."[14]

A. Valuation Date in Alberta

[14] The MPA does not expressly specify what date should be used to value matrimonial property. However, Alberta courts have addressed this issue extensively.

[15] Until 2005, the leading case on valuation date was *Mazurenko v Mazurenko*.[15] In that case, the Court of Appeal concluded that in the absence of an express provision stating the applicable valuation date, there was a "general principle that valuation be made at trial." Based on that terminology, subsequent lower courts found that valuation and division as of trial was a presumptive rule that could be departed from in special circumstances.[16]

[16] In 2005, the Court of Appeal held in *Hodgson* that matrimonial property *must* be valued and divided as of trial. The Court also directed that if there were any concerns with respect to using trial as the valuation date, those concerns could be addressed using the factors set out in section 8 of the MPA.[17]

[17] *Hodgson* makes it clear that courts are "obliged to divide the matrimonial property as of the date of trial" and that "[t]his is not a rebuttable presumption but a rule of division."[18]

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[14] Berend Hovius, "Market Driven Changes in Property Values after the Valuation Date under Ontario's *Family Law Act*: The Story Continues" (2009) 28 Can Fam LQ 105 at 105.

[15] *Mazurenko v Mazurenko*, [1981] 30 AR 34 at para 15.

[16] See, for example, *Hodgson v Hodgson*, 2002 ABQB 628 at para 28. The trial court did not use trial as the valuation date due to special circumstances, including that the spouses' separation exceeded 11 years, the husband and wife led independent lives between separation and trial, and the substantive change to the spouses' financial circumstances since their separation. See also the summary of the law in *Kazmierczak v Kazmierczak*, 2001 ABQB 610 at paras 50-61.

[17] *Hodgson* at paras 32–33.

[18] *Hodgson* at para 32.

[18] In *Hodgson*, the Court of Appeal notes that several provisions in the MPA implicitly support valuing property as of trial. Those provisions include:

- Section 7(1): The Court notes that the plain meaning of this section entitles a trial judge "to determine the scope of divisible assets at the time that the matter comes before him or her -- the time of trial."[19]
- Section 7(3)(a): The Court notes that the MPA requires the Court to distribute any increase in the value of exempted property that occurs during the marriage. The value of that property is determined by subtracting the exempted value of the property described in section 7(2) from its market value at trial. As noted by the Court of Appeal, "it is necessary to determine the value of that property as at the date of trial in order to ascertain the amount of property distributable under section 7(3)(a)."[20]
- Section 7(3)(c): The Court observed that this section permits property acquired after divorce but before the division of property under the MPA to be divided between the spouses.[21]
- Section 8(d): As this section requires the court to take into account property and other financial resources that each spouse had at trial, the Court concluded that this requirement "comes close to being a statement of legislative intent that the date for the valuation and division of matrimonial property should be the date of trial."[22]
- Section 8(f): This section contemplates the division of property after the spouses have separated, as it requires the Court to consider property acquired while the spouses have been living separate and apart.[23]

B. Valuation Dates in Canada

[19] The table below shows that most Canadian jurisdictions specify the applicable valuation date in their matrimonial property legislation. Further, the

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[19] *Hodgson* at para 12.

[20] *Hodgson* at para 13.

[21] *Hodgson* at para 14.

[22] *Hodgson* at para 16.

[23] *Hodgson* at para 16.

majority of Canadian jurisdictions value matrimonial property as of separation rather than trial. In some jurisdictions, separation is one of several potential valuation dates that may be used.

Date of valuation	Jurisdiction	Legislation
Earliest of the following dates: ▪ date of separation ▪ date divorce or declaration of nullity is granted ▪ date an application to prevent the improvident depletion of assets is commenced	Ontario	*Family Law Act*, RSO 1990, c F.3, s 4(1), "valuation date"
	Prince Edward Island	*Family Law Act*, RSPEI 1988, c F-2.1, s 4(1)(d)
	Yukon	*Family Property and Support Act*, RSY 2002, c 83, ss 15(3) and 6(2)
	Northwest Territories	*Family Law Act*, SNWT 1997, c 18, s 33, "valuation date"
	Nunavut	*Family Law Act*, SNWT (Nu) 1997, c 18, s 33, "valuation date"
Either when the spouses cease cohabitating or the application is brought (in the event cohabitation continues)	Manitoba	*Family Property Act*, CCSM c F25, s 16
Goal is to achieve division as of true separation date; court has discretion to determine the date of division for each asset	Nova Scotia	N/A
Separation for non-marital property and trial for marital property; valuation date may be selected on an asset by asset basis	New Brunswick	N/A
As agreed or at the hearing	British Columbia	*Family Law Act*, SBC 2011, c 25, s 87(b)
Application or adjudication	Saskatchewan	*Family Property Act*, SS 1997, c F-6.3, s 2(1), "value"
Retroactively to the application	Quebec	*Civil Code of* Québec, LRQ, c C-1991, art 465
Implementation of division of property	Newfoundland & Labrador	N/A

[20] While trial is used as a valuation date in fewer Canadian jurisdictions, Alberta is not the only jurisdiction to value and divide matrimonial property at trial. There is no data to indicate whether one valuation date produces fairer results. Indeed, it would likely be impossible to design such a study given the

number of variables to consider and the subjective nature of fairness. Further, there do not appear to be any studies analyzing litigation trends in jurisdictions that have switched from valuing at trial to valuing at separation.

C. Law Reform Recommendations

[21] Three Canadian law reform agencies have considered the issue of valuation dates.

1. NOVA SCOTIA

[22] In 1997, the Law Reform Commission of Nova Scotia recommended that Nova Scotia's matrimonial property legislation should articulate a presumption that the valuation date is the date of separation. In making this recommendation, the Commission noted that separation should not be a rule, and that courts should be able to depart from separation where the circumstances justify it. The Commission specifically noted that using an absolute valuation date has proven inconvenient in other provinces.[24]

[23] The recommendations of the Law Reform Commission of Nova Scotia were not adopted in the *Matrimonial Property Act*.[25] Nova Scotia continues to apply a valuation date established through case law.

2. SASKATCHEWAN

[24] In both 1985 and 1996, the Law Reform Commission of Saskatchewan considered valuation dates.[26] Initially, the Commission recommended changing the valuation date from application or adjudication to separation. The Commission noted that separation is "the logical date for determining the value of matrimonial property," as this is "[w]hen the spouses go their separate ways, the marriage partnership is over, and joint contribution ceases."[27] However,

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[24] Law Reform Commission of Nova Scotia, *Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, Final Report (1997) at 30. The Commission noted that Nova Scotia's matrimonial property legislation at that time did not state a valuation date, but that the general practice of the Nova Scotia courts was to value matrimonial property as of the date of separation.

[25] *Matrimonial Property Act*, RSNS 1989, c 275.

[26] Law Reform Commission of Saskatchewan, *The Matrimonial Property Act: Selected Topics*, Report (1996) [Saskatchewan Report 1996] and *Proposals Relating to Matrimonial Property Legislation*, Report (1985) [Saskatchewan Report 1985].

[27] Saskatchewan Report 1985 at 14. This recommendation was made specifically in regard to spouses who were no longer cohabitating.

adjustments would be necessary prior to distribution if the value of the property increased or decreased after separation: [28]

> The courts must distinguish between increases in the value of matrimonial property that result from contributions made after separation (such as income earned from employment), and increases in the value of existing assets. An increase in value due to market forces or inflation after the date of separation should be shared. On the other hand, income earned from employment by a spouse between the date of separation and the date of the matrimonial property order should not be divided.

[25] In 1996, the Commission changed its recommendation, noting that separation is a less precise valuation date than application.[29] The Commission also observed that arguments to adopt separation would be stronger if the length of the separation was not a relevant factor to consider when departing from an equal division of matrimonial property.[30]

[26] The Commission instead recommended that Saskatchewan's legislation give direction as to when property should be valued as of application, and when property should be valued as of adjudication. Due to the lack of direction in the legislation, the Commission was concerned that the choice in valuation dates created uncertainty, which could lead to delay, expense, inconsistent results, and diminish the possibility of settlement.[31]

[27] Saskatchewan's *Matrimonial Property Act* was replaced with *The Family Property Act*. The provisions in the legislation regarding valuation dates were not changed. [32] The Commission's recommendations on valuation dates have not been implemented; Saskatchewan retains valuation as of the application or adjudication date.

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[28] Saskatchewan Report 1985 at 15.

[29] Saskatchewan Report 1996 at 18-19. The Report acknowledges the prior recommendation from 1985, and notes that determining the separation date has proven to be difficult in provinces where property is valued as of the separation date.

[30] Saskatchewan Report 1996 at 19.

[31] Saskatchewan Report 1996 at 9.

[32] *The Matrimonial Property Act*, SS 1979, c M-6.1, s 2(l); *The Family Property Act*, SS 1997, c F-6.3, s 2(1) [Saskatchewan Act].

3. ONTARIO

[28] The Ontario Law Reform Commission considered valuation dates in 1993.[33] The Commission noted that because the courts do not have discretion to vary the valuation date in Ontario, the courts had begun to resort to constructive trusts to distribute any significant change in the value of matrimonial property that occurred between valuation and trial. The Commission noted that such unjust enrichment claims were contrary to the purpose of specifying the valuation date in Ontario's legislation; namely, to provide certainty and discourage litigation.[34] The ultimate policy consideration that the Commission highlighted was whether couples should share in post-separation changes in the value of matrimonial property, and if so, whether spouses should share in all changes in value, regardless of their cause.[35]

[29] The Commission ultimately did not recommend changing the valuation date provision in Ontario's legislation.[36] Potential options that the Commission ruled out included trial and court discretion to select an appropriate valuation date. In terms of changing the valuation date to trial, the Commission noted concerns of spouses attempting to delay trial depending market speculation. If courts were given discretion to select a valuation date, the Commission was concerned that courts could become embroiled in a factual inquiry on causation, depending on whether or not there was a gain or loss in the value of matrimonial property. The Commission observed that such an inquiry would add to the length and costs of litigation.[37]

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[33] Law Reform Commission of Ontario, *Report on Family Property Law*, Final Report (1993) [Ontario Report].

[34] Ontario Report at 52. In fact, the Commission went on to note at 56 that the essential issue is resolving tension between the need to achieve consistency and predictability and the desire to ensure that individuals receive fair treatment.

[35] Ontario Report at 57.

[36] The Commission recommended amending the legislation to give Ontario courts the discretion to vary an equalization payment to recognize substantial changes in the value of assets after the valuation date if necessary to ensure an equitable result, having regard to the cause of the fluctuation in value. See Ontario Report at 59, 71, 144. The Commission was cognizant that changes in value due to market forces, for example, should be treated differently than changes in value due to the agency or efforts of one spouse. See at 57.

It appears that the Commission's recommendation was not implemented. See the *Family Law Act*, RSO 1990, c F.3, s 5(6) [Ontario Act].

[37] Ontario Report at 58–59.

D. Valuation Date and the *Matrimonial Property Act*

[30] While the Court of Appeal of Alberta made it quite clear in *Hodgson* that the valuation date in Alberta is the date of trial, amending the MPA to expressly include a valuation date could be advantageous for a number of reasons. For example, it would be easier for self-represented litigants to find the valuation date if stated in the MPA rather than in case law. An express legislated statement may also be advantageous for lawyers. Despite the Court of Appeal's decision in *Hodgson*, it appears that lawyers and the courts still occasionally grapple with the issue of which valuation date to use. Moreover, this change would be consistent with legislation in other Canadian jurisdictions. As noted above, most jurisdictions expressly specify the valuation date in legislation.

E. Agreed Valuation Date

1. GENERALLY

[31] ALRI considers that spouses should be permitted to have their property valued as of an agreed date. In effect, this is what happens in many cases and it is appropriate and instructive to specify this option in the MPA.[38] Allowing spouses to choose their own valuation date is consistent with promoting settlement and a party driven dispute resolution process.

[32] Further, expressly permitting an agreement on valuation date is consistent with allowing the opportunity for reconciliation. It encourages dialogue and cooperation between the spouses, which could lead to a decision to reconcile. An agreed date should also facilitate settlement in two ways. First, if parties are able to achieve an agreement regarding valuation date, they may feel encouraged to go further and reach a global property settlement. Second, agreeing on a valuation date will remove any incentive that parties may have to wait and see how valuation is handled at trial. If one advantage of waiting until trial is removed, then it may encourage quicker, overall resolution.

[33] An agreed valuation date would also reduce cost and delay. For example, by choosing their own date, parties will only need to have their property valued once (i.e., as of the date they choose). This will reduce the costs usually

[38] It should also be noted that in *Hodsgon* at para 29, the Court of Appeal observed that the MPA does not affect the freedom of spouses to agree to a division based on a valuation at a date of their own choosing, as long as the agreement satisfies the conditions set out in sections 37 and 38 of the MPA.

associated with valuation updates that are required if the parties intend to proceed to trial. Further, when valuation is done at trial, often there is incentive for one party to delay matters in the hope that the market will fluctuate and either reduce or increase the equalization payment. However, if valuation is done using an agreed past date, there will be no incentive to delay matters in order to take advantage of market changes.

[34] Choosing a valuation date will also allow parties to signal the end of their economic partnership by picking a valuation date that makes sense to them (i.e., the date the joint account was separated, the date one party took over the mortgage). Finally, in agreeing on a valuation date, spouses are able to take into account what information they have and what information is required for an accurate valuation.

[35] The majority of survey participants agreed that the MPA should expressly provide that spouses may agree on a valuation date.[39] They felt that it is appropriate to identify the ability to agree on a valuation date in the MPA for two reasons. First, it will educate parties about their options and, second, it will mirror what already occurs in practice. According to one practitioner:

> The first recommendation in ALRI's report (spouses can agree upon the date they wish) is entirely uncontroversial. This actually mirrors what occurs most of the time in negotiations anyway. It does away with the iron-clad "rule of division" as stated in *Hodgson* and it respects the ability of spouses to agree on a date that feels fair to them.

[36] Another practitioner indicated that when parties are able to agree on a valuation date, they are usually able to reach a full property settlement. However, there are instances where parties are able to agree on a valuation date, but not on a specific division of assets. The practitioner suggested that an express provision in the MPA permitting an agreement regarding valuation date would be helpful in these types of situations. It would allow the trial judge to use the valuation date chosen by the parties when distributing matrimonial property.

[37] However, it should be noted that a minority of survey participants disagreed with inserting such a provision in the MPA.[40] They felt that it would

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[39] 86.1% of survey participants agreed that the MPA should expressly provide that spouses may agree on a valuation date. Out of the eleven written submissions provided to ALRI, three addressed this issue specifically. All three of the submissions supported the recommendation that the MPA should expressly provide that spouses may agree on a valuation date.

[40] 13.9% of survey participants felt that such an amendment to the MPA was unnecessary.

do nothing more than advertise to spouses that they have one more thing to argue over. Further, section 37 of the MPA is already broad enough in scope to allow parties to agree on a valuation date, so a further amendment is unnecessary.[41]

[38] While this may be true, section 37 also aims to allow parties to provide for the complete division of their property. As such it may be daunting to consider section 37 for the simpler matter of agreeing on a valuation date. A separate, brief provision to alert spouses to the option of agreeing on a valuation date would be more accessible and might encourage further agreement under section 37.

RECOMMENDATION 1

The *Matrimonial Property Act* should expressly provide that spouses may agree on a valuation date.

2. FORMALITIES FOR AGREEMENT

[39] Sections 37 and 38 provide that, in order for spouses to contract out of the default provisions of the MPA and make their own agreement regarding the division of matrimonial property, the following formalities must be observed:[42]

- The agreement must be reduced to writing.
- Each spouse must receive independent legal advice regarding the agreement.

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[41] The MPA provides:

> **Agreements between spouses**
>
> **37(1)** Part 1 does not apply to property that is owned by either or both spouses or that may be acquired by either or both of them, if, in respect of that property, the spouses have entered into a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property.
>
> **(2)** An agreement under subsection (1) may be entered into by 2 persons in contemplation of their marriage to each other but is unenforceable until after the marriage.
>
> **(3)** An agreement under subsection (1)
>
> (a) may provide for the distribution of property between the spouses at any time including, but not limited to, the time of separation of the spouses or the dissolution of the marriage, and
>
> (b) may apply to property owned by both spouses and by each of them at or after the time the agreement is made.
>
> **(4)** An agreement under subsection (1) is unenforceable by a spouse if that spouse, at the time the agreement was made, knew or had reason to believe that the marriage was void.

[42] An agreement on valuation date must comply with sections 37 and 38 of the MPA because it is being used to contract out of the MPA's default valuation date. The express provision allowing an agreement on valuation date is not itself a default provision.

- The spouses cannot consult the same lawyer. In other words, the lawyer that gives one spouse independent legal advice must be different from the lawyer who gives the other spouse independent legal advice.
- When receiving independent legal advice from his or her lawyer, each spouse must acknowledge that he or she is:
  - aware of the nature and effect of the agreement;
  - aware of the possible future claims to property he or she may have under the MPA, and that he or she intends to give up those claims in order to give effect to the agreement; and,
  - executing the agreement freely and voluntarily, without any compulsion from the other spouse.
- The acknowledgments listed above must be made in writing and apart from the other spouse.

[40] Section 37 also establishes rules for agreements made in contemplation of marriage, when distribution under an agreement may take place, and to which types of property an agreement may apply.

[41] It is appropriate for all of these requirements to apply to an agreement regarding valuation date. However, an agreement confined to valuation date should not impact any future claims to matrimonial property. Therefore, if an agreement deals only with valuation date, the section 38(1)(b) provision regarding giving up future claims is inappropriate and should not apply. However, if the agreement regarding valuation date is part of a larger agreement dealing with the status, ownership and division of matrimonial property, then compliance with section 38(1)(b) is appropriate. This distinction is reflected in the sample draft amendments set out in the Appendix.

RECOMMENDATION 2

Before executing an agreement regarding valuation date, spouses should be required to obtain independent legal advice as outlined in section 38 of the *Matrimonial Property Act*.

RECOMMENDATION 3

Section 38(1)(b) of the *Matrimonial Property* Act regarding future claims should not apply to agreements confined to valuation date.

3. SHOULD AGREEMENT ON VALUATION DATE BE LIMITED?

[42] It was further suggested that an agreement regarding valuation date should only be permitted following separation, and not as a term of a pre-nuptial agreement. When the pre-nuptial agreement is being negotiated, the parties will not have all of the information needed to make a reasoned decision regarding valuation date.

[43] However, provided they comply with sections 37 and 38 of the MPA, pre-nuptial agreements allow parties to negotiate complete agreements regarding the status, ownership, and division of their property upon a marriage breakdown. They are drafted prior to the marriage, at a time when neither party has any information regarding the marriage relationship. If agreements regarding ownership and division are permitted in a pre-nuptial agreement, there is no principled reason why agreements regarding valuation date should be any different.

[44] Thus, it is ALRI's position that any legislative statement regarding valuation dates does not require a qualification that spouses may not enter into such an agreement until separation has occurred.

F. Default Valuation Date

[45] In addition to allowing spouses to agree on a valuation date, the MPA would still need a default date that would apply where spouses do not agree. In terms of potential valuation dates that could be specified in the MPA, this report focuses on two potential dates – trial and separation.

[46] For the purposes of determining which valuation date is preferable as a default it is useful to consider the following factors:

- reconciliation
- cost
- settlement
- delay
- accuracy of information
- end of the economic partnership

1. ADVANTAGES OF VALUATION AT TRIAL

a. Reconciliation

[47] It is important to bear in mind that spouses have the option to reconcile after separation. Valuation as of separation may not encourage reconciliation as it requires spouses to think about proceeding to property division. On the other hand, valuation at a more distant trial date may facilitate opportunities for reconciliation.

b. Accuracy of information

[48] If property is valued as of trial, the courts should be able to get an accurate picture of the spouses' financial situations close to the time of distribution. There also should be no ambiguity as to the date the action was tried, and therefore no ambiguity as to the valuation date. That said, no matter how accurate the picture that is presented, the property will never truly be valued as of the date of trial, as property appraisals must be completed prior to trial.

c. End of the economic partnership

[49] A further consideration is determining when the spouses' economic partnership ends. As noted by the Court of Queen's Bench, even if the spouses wish their economic partnership to be at an end as of separation, they often "are not totally independent" by that point.[43] For example, even after separation the spouses may continue to share property and make economic decisions together.[44] Indeed, in some cases some form of economic partnership may endure long after the divorce and formal property division.

[50] This may be especially true in light of the recent trend identified by practitioners during consultation of couples continuing to reside together even after making the decision to separate. In these situations, the economic partnership may last well beyond the date of separation that is identified by the parties.

[51] To put it another way, separation is a transitional process. To say that there is a presumption that the spouses should not equally share their family assets during this transition period seemed unfair to some survey participants.

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[43] *Kazmierczak v Kazmierczak*, 2001 ABQB 610 at para 50.

[44] Background Paper at para 60.

Thus, for couples whose economic partnership endures well beyond separation, it may be preferable to value property at the date of trial.

2. DISADVANTAGES OF VALUATION AT TRIAL

a. Cost

[52] ALRI's Background Paper notes concern among practitioners that valuing matrimonial property as of trial increases the cost of dispute resolution.[45] This increase has been linked to the fact that the trial is a moving target. Until trial, the date as of which the property must be valued and the property's respective value are uncertain. As a result, spouses often need to have their matrimonial property valued more than once. For example, if the spouses have the property valued early for the purpose of entering settlement discussions, that valuation will likely need to be updated for trial. Further updates may also be required if the trial is delayed or there is significant wait time for a trial.[46]

[53] The majority of participants who attended the LESA seminars in Edmonton and Calgary confirmed that, in their view, it is more expensive to value matrimonial property as of trial than it would be to value it as of separation.[47]

[54] However, one practitioner who provided written feedback on the Report for Discussion indicated that the cost of obtaining an updated valuation is rarely an onerous undertaking. Frequently, financial professionals will charge less for providing updates than they will for from-scratch assessments. The spouses will often share the costs associated with these updates, or they will agree to utilize an earlier valuation report in order to save costs.

[55] While it may be true that obtaining an updated valuation is not necessarily an onerous task, it does represent an extra cost that would not be necessary if matrimonial property were valued as at the date of separation.

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[45] Background Paper at para 2.

[46] Background Paper at paras 34, 37, 66.

[47] Over 64% of Edmonton participants indicated that they would agree or strongly agree that it is more expensive to value matrimonial property as of the date of trial. Eighty percent of Calgary participants indicated that they would agree or strongly agree that it is more expensive to value matrimonial property as of the date of trial.

As discussed in Chapter 3, a change in circumstances may also lead to one or both spouses arguing that a change in the value of specific property should be taken into account.

b. Settlement

[56] Another concern raised by practitioners in the Background Paper was that valuing matrimonial property at trial hinders settlement. For example, reluctance to provide updated property valuations may undermine settlement negotiations.[48] Further, it may be difficult for spouses to negotiate a settlement pertaining to the value of matrimonial property, given that the spouses must negotiate backwards from an unknown date and unknown property values.[49]

c. Delay

[57] The Background Paper also notes concern that valuing matrimonial property as of trial can cause delays.[50] A party may delay settlement if that party believes there is a benefit from doing so. For example, one spouse may wish to delay in the belief that the value of the other spouse's business will increase, which would result in the delaying spouse receiving a better value for the matrimonial property. Similarly, one spouse may wish to delay in the belief that the value of the property will decrease, resulting in the other spouse receiving less value.

[58] Delay may also occur in areas that are beyond the control of either party. For example, where valuation is to be done at trial, whether a trial date is available within six months or whether spouses may need to wait a year or longer will delay valuation.

[59] Finally, as noted above, delay may increase cost if the valuation needs to be repeated or updated.

3. ADVANTAGES OF VALUATION AT SEPARATION

a. Cost

[60] If matrimonial property is valued as of separation, the spouses should only need to have their entire property valued once. In other words, if matrimonial property is valued using a past date, its value should not subsequently change for purposes of division. Therefore, it is probable that

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[48] Background Paper at paras 34, 37, 66.

[49] See Background Paper at para 58.

[50] Background Paper at para 2.

spouses would incur less expense if property was valued using separation as it would no longer be necessary to update property valuations prior to trial.[51]

[61] The Family Law Steering Committee of the Court of Queen's Bench of Alberta provided a written submission regarding the recommendations put forth in the Report for Discussion. The majority of the Committee agreed that setting the default valuation date at the date of separation will eliminate the need for ongoing updates. As a result, the costs and delays usually associated with valuing property at trial will be substantially reduced.[52]

b. Settlement

[62] Valuing matrimonial property as of separation may be more conducive to settlement than valuing as at the date of trial. For example, by using the date of separation, neither party would derive a benefit from waiting to have the property valued at trial.

[63] However, some survey participants were of the view that valuation at separation would actually hinder settlement. For example, there was a concern that moving valuation to the date of separation would increase hostility by giving the spouses one more thing to fight over (i.e., when did separation occur). As one survey participant noted:

> If the default is the separation date, then the parties need to first determine what the separation date is. This means that the parties are now using whatever means necessary, including social media, in order to try and establish a separation date which is more favourable to them. The resulting flame war between the parties would run in opposition to the settlement process.

[64] Further, some survey participants felt that adopting separation as the default valuation date would exacerbate any power imbalance existing between the spouses. According to some practitioners, it is not uncommon for one spouse to hold and control most or all of the family assets, even after marriage breakdown. When valuation occurs at trial, there is a built-in incentive for the spouse with control of the assets to the "come to the table" in order to stop the

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[51] The court will continue to need to value certain pieces of property at two different points in time, even if the date of separation is used to value the property. For example, two valuations will be required when the court needs to determine whether s 7(2) exempt property has increased in value during the marriage.

[52] According to the Committee: "Except in circumstances where a trial date for valuation is sought, there will be no need for the ongoing updates to valuations that we currently see, with the resulting delays and additional costs to the parties."

sharing period sooner. In other words, "by setting the valuation date at the date of trial, the spouse with less money has some bargaining power insofar as the growth in assets is often given up to achieve settlement."

[65] If valuation is moved to the date of separation, that bargaining power is lost. Some survey participants indicated that this power dynamic would represent a major obstacle to settlement if assets are to be valued as at separation.

[66] In contrast, participants at both the LESA seminars and the Central Alberta Bar Society seminar agreed that valuing matrimonial property as of separation would be more conducive to settlement than valuation as of trial. Similarly, the majority of survey participants agreed that setting separation as the default valuation date would encourage settlement.[53]

c. Delay

[67] If matrimonial property is valued as of separation there should be no incentive to delay. As noted above, when valuation occurs at a past date, delays that are associated with valuing property at trial will be substantially reduced. For example, updated valuations will be irrelevant, so negotiations will not be stalled while parties wait for an updated report. Further, there will be no incentive for parties to wait and see how valuation will be handled at trial. Moreover, instances of one party waiting for trial so that market forces will either reduce or increase his or her potential value should also be reduced if valuation occurs as at separation.[54]

d. End of the economic partnership

[68] While parties may not be completely independent at the date of separation, considering the economic partnership to be at an end at that date may still be more consistent with the separation process. Upon separation, it is common for the spouses to impose some type of interim distribution of matrimonial property. Moreover, after separation, the conduct of spouses may no longer be conducive to an ongoing economic partnership. After the spouses separate and begin to live separate and apart, they may act in their own interests, rather than the interests of the partnership. This approach to separation may

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[53] According to one practitioner who provided a written response: "Changing the default date to the date of separation is a wonderful and long overdue improvement. It will reduce litigation and make a speedy resolution much more likely."

[54] The question of how post-valuation increases and decreases in property value should be dealt with is discussed later in this report.

undermine arguments that matrimonial property should be divided as of trial. For example, during the LESA seminar in Edmonton, it was noted that after separation, the spouses may prefer to spend income prior to trial rather than save it, to ensure that such income is not available to share with their former spouse by the time of trial.[55]

[69] Considering the economic partnership to be at an end as of separation would mirror the *Adult Interdependent Relationships Act*. Under that statute, an adult interdependent relationship is terminated at the date that the parties begin living separate and apart. When adult interdependent partners value and divide property, they will do so as of the date that their relationship was terminated. As a result, property valuation and division between non-married spouses will usually be accomplished as at the date of separation. This reinforces the notion that separation is the most realistic point at which to assume that the economic partnership has come to an end.[56]

4. DISADVANTAGES OF VALUATION AT SEPARATION

a. Reconciliation

[70] As noted above, valuation as of separation may not encourage reconciliation as it requires spouses to think about proceeding to property division and crafting a settlement. However, if spouses reconcile, valuation and division of matrimonial property will not be required.

[71] On the other hand, property is usually the last topic that separating spouses will discuss; thus, reconciliation may no longer be a viable consideration once parties reach the property settlement stage.[57] As such, valuation date may have little to no impact on the process of reconciliation.[58] This is, at best, a neutral factor.

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[55] This issue was also brought up by one survey participant: "Clients get in "spending wars" because neither wants to accumulate money that they will have to share with their estranged spouse."

[56] *Adult Interdependent Relationships Act*, SA 2002, c A-4.5, s 10. Notably, the Family Law Steering Committee of the Court of Queen's Bench of Alberta concurs with ALRI on this point: "A date of separation value would result in some consistency on this issue, in the treatment of divorcing couples as compared to couples living in adult interdependent partnerships."

[57] Custody, child support and spousal support are usually dealt with before matrimonial property valuation and division are discussed.

[58] As noted by a practitioner in a written submission provided: "I don't think reconciliation is a large factor here – most couples have exhausted reconciliation options by the time they move through property negotiations – there are only very few for whom this is an important factor for consideration."

b. Accuracy of information

[72] For those couples who proceed to trial, it is easy to ascertain at which date valuation has occurred. They will have a specified trial date and a written judgment with a date that they can point to. On the other hand, it may be difficult to accurately pinpoint the date of separation, given that separation can be a process that occurs over time.[59]

[73] Establishing actual values as of the date of separation may also pose a problem. For example, separation offers some certainty if valuation is done early on. However, in situations where property issues are not dealt with promptly, there may be challenges in establishing historic values many years after the spouses separate.[60]

[74] A concern expressed during the online survey is that valuation conducted at separation may no longer be accurate when the time comes to actually distribute the property. For example, if the housing market depreciates after valuation but before distribution, the spouse who intends to retain the matrimonial home may not qualify for a mortgage at the separation amount. This would mean that he or she would owe an equalization payment that was based on the separation value, but can only qualify for financing based on the lower, current value. If he or she cannot afford to pay the agreed upon equalization payment because the market has declined, the whole settlement could be derailed.[61]

5. DISCUSSION OF CONSULTATION RESULTS

[75] The consultation results were not unanimous; a minority of participants were of the view that valuation should remain at the date of trial.[62] For example, some survey participants felt that it would become more complicated to value and divide matrimonial property if valuation were to be done at separation. In the most general sense, divorcing couples will fall into two categories: those who can reach an agreement on property division, and those who cannot reach an agreement and must proceed to trial. Under the current system, those who

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[59] Background Paper at para 60.

[60] *Kazmierczak v Kazmierczak*, 2001 ABQB 610 at para 50.

[61] Post-valuation changes are considered more fully in Chapter 3.

[62] 35.8% of survey participants felt that the default valuation date should not be changed to the date of separation. Eleven written submissions were provided to ALRI on this issue; three of those submissions indicated that the default valuation date should not be changed to the date of separation.

proceed to trial will have their property valued and divided as of the trial date. However, if the valuation date were changed to the date of separation, the trial judge automatically has the additional task of addressing any property changes that occurred between separation and trial. In other words, proceeding to trial becomes a more complex exercise because of the need to address any post-separation changes.

[76] In addition, by setting the default valuation date at separation, spouses may be encouraged to "strategize" and initiate the marriage breakdown at a time that is financially advantageous for them. For example, the party initiating separation could manipulate circumstances by running up debt or discharging property just prior to separation in order to gain an advantage.

[77] Further, as noted above, moving valuation to the date of separation may increase hostility between the parties by making the question of when separation occurred a relevant consideration. In situations where there has been a long gap between the date of separation and the commencement of property negotiations, obtaining historical property valuations may also be problematic.

[78] The two biggest objections to setting the default valuation date at the date of separation that were identified by survey participants are already discussed at paras [50] to [52] and paras [67] to [68] above. First, some survey participants felt that it is unrealistic and inaccurate to equate separation with the end of the economic partnership.[63] According to one practitioner:

> In many cases that I deal with, it is a fiction to think that the economic partnership ends at separation. Many cases involve a division of labour in which the parties have differential roles based on decisions made during the course of the marriage. It is impossible for many couples to change this at date of separation ... and for most couples, there is a continuing economic partnership of some sort, especially where there are children.

[79] In other words, it is misleading to rely on the end of the economic partnership to support separation as the default valuation date, especially when marriage is much more than an economic partnership. As noted by one practitioner who submitted written feedback on the Report for Discussion:

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[63] One survey participant relied on the Court's reasoning in *Kazmierczak v Kazmierczak*, 2001 ABQB 610: "The Court of Queen's Bench in *Kazmierczak* had it right in noting that spouses are not totally independent as of separation. To make this the date for valuation does not meet the intention of our *Matrimonial Property Act* to recognize the many facets of a marriage, and the many ways to contribute to the relationship."

> To establish the date of separation as the valuation date of matrimonial assets would place too much emphasis on the economics of the marriage partnership, to the detriment of consideration of other aspects of the partnership including all of the non-monetary contributions needed to maintain the family relationship and many other indirect contributions to the marriage, many of which continue after separation.
>
> ...
>
> Where the valuation date is the date of trial or settlement as it is now, counsel (and I believe CQB) generally consider the marriage relationship right up to the time of trial and approach the continued contributions as "equal" when considering 7(4) property, despite the physical separation. If the valuation date is the date of separation, I'm satisfied counsel for the person with the matrimonial assets would attempt to parse the section 8 factors in a way that will not recognize the hard fought for equality of financial and non-financial contributions.

[80] Second, those against using separation as the default valuation date argued that it will actually hinder settlement and increase delay. For example, if one spouse holds the majority of the matrimonial assets and he or she knows that valuation is done at separation, there is no incentive to resolve matters quickly. He or she will believe that any increases in value, or any new property acquired following separation, will be safe from valuation and division. In other words, he or she "can delay resolution because they have nothing to lose." This dynamic was the factor most frequently cited by survey participants as a reason to retain valuation as at the date of trial.

[81] However, despite the arguments listed above, the majority of survey participants agreed that the MPA should set the default valuation date at the date of separation.[64] It is the approach that is most consistent with other Canadian jurisdictions, and it reflects what most divorcing couples already believe. Many survey participants and practitioners who submitted written feedback indicated that most of their clients already believe that valuation is done at the date of separation. Clients are surprised and annoyed to discover that

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[64] 64.2% of survey participants agreed that the MPA should expressly provide that the default valuation date will be the date of separation. Of the eleven written submissions provided to ALRI on this issue, eight supported changing the default valuation date under the MPA to the date of separation. Notably, one of the written submissions was provided by the Family Law Steering Committee of the Court of Queen's Bench of Alberta. The Committee agreed with ALRI's recommendation that the MPA should expressly provide that the default valuation date should be the date of separation.

the current law values property as at the date of trial.[65] Further, due in part to the belief that valuation is conducted at the date of separation, property is often divided informally before counsel is even involved. This leads to a situation where "equity or debt is accrued unilaterally before a final division is in place." Matching the valuation date to current expectations may simplify the process and alleviate the difficulties associated with an informal and premature division of assets.

[82] The majority of survey participants also agreed with the factors in favour of separation that were identified in the Report for Discussion.[66] Specifically, the majority agreed that using separation as the default valuation date will reduce cost and delay by eliminating the need for updated disclosure and valuations. As noted by one practitioner, under the current law "divorcing couples are constantly updating their financial disclosure, leading to frustration and disgust with the system." However, using the date of separation should alleviate these problems. Further, using the separation date will encourage settlement by removing the incentive for delaying property proceedings (especially in an appreciating market). Finally, it will allow parties to base their property negotiations on established values, rather than bargaining backwards from a future date.[67]

[83] On balance, ALRI considers that separation is the appropriate default valuation date. In most cases, separation should facilitate settlement as spouses are working forwards from a known valuation date rather than towards an uncertain future valuation. Cost and delay should be reduced as updates will be less relevant. Provided valuation is done in a timely manner the information should be fairly accurate. While separation has some short comings as a default valuation date, it is more in keeping with the settlement focus of current matrimonial law practice. The majority of survey participants support this

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[65] According to one practitioner who provided a written response: "It becomes very frustrating for litigants to learn that the date of trial (or settlement) is a continuing moving target, thus increasing cost and uncertainty in an area that needs less of both."

[66] According to one practitioner who provided a written response:

> [I]t makes sense from both a practical perspective (it is a known date and the numbers are not constantly changing) and from a fairness perspective (if there is a reason to continue entitlement after the family unit has ceased to be one pot, then section 8 is available). It will also potentially speed the process up as delay works to no one's benefit.

[67] According to one survey participant: "Using the date of trial as the valuation date is ludicrous because it uses a date that does not exist."

conclusion.[68] Moreover, where date of separation produces inappropriate results the spouses are free to agree on another date.

6. IS A LEGISLATIVE DEFINITION OF SEPARATION REQUIRED?

[84] Some survey participants who supported using separation as the default valuation date also indicated that the MPA should clearly define the concept of separation if the default is changed to that date.

[85] However, it is ALRI's position that a legislative definition of separation is unnecessary. Some Canadian jurisdictions that already use separation as the applicable valuation date define it with reference to the definition of "separate and apart" found in section 8(3) of the *Divorce Act*.[69] Further, the courts are frequently called upon to determine beginning and end dates for relationships under the *Adult Interdependent Relationships Act*.[70] Since there is already a wealth of case law developed under both the *Divorce Act* and the *Adult Interdependent Relationships Act* relating to the date of separation, it should not be difficult to determine a separation date in the context of matrimonial property division.

[86] Further, section 5 of the MPA already uses the phrase "separate and apart" when describing the conditions precedent to a matrimonial property application. There is no indication that this phrase has caused any difficulty with respect to the interpretation of section 5. Therefore, the identical phrase should not create a problem if used in the context of the default valuation date.

[87] Therefore, it is ALRI's position that, provided any amendment to the MPA uses the phrase "separate and apart" to define the default valuation date, a legislative definition of separation is unnecessary. Sample draft provisions identifying separation as the default valuation date under the MPA have been included in the Appendix.

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[68] 64.2% of survey participants agreed that the MPA should expressly provide that the default valuation date will be the date of separation.

[69] *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 8(3). See also *Family Law Act*, RSPEI 1988, c F-2.1, ss 4(1)(d) and 1(3) [PEI Act]; *Family Property and Support Act*, RSY 2002, c 83, ss 15(3) and 6(2)(c) [Yukon Act].

[70] *Adult Interdependent Relationships Act*, SA 2002, c A-4.5.

RECOMMENDATION 4

If spouses do not agree on a valuation date, the *Matrimonial Property Act* should expressly provide that the default valuation date will be the date on which the parties begin to live separate and apart.

7. CONSEQUENTIAL AMENDMENTS

[88] In *Hodgson*, the Court of Appeal noted several provisions in the MPA that implicitly support using the date of trial as the default valuation date.[71] Therefore, if the MPA is amended to include an express statement that the default valuation date is the date of separation, some consequential amendments are required. These amendments will ensure that the MPA is internally consistent, and that none of the existing provisions will contradict an amendment setting the default valuation date at separation. Further, the consequential amendments proposed below will confirm that *Hodgson* has been superseded by the amendments proposed in this Report.

a. Section 7(3)(a)

[89] Section 7(3)(a) provides:

> **Distribution of property**
>
> (3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:
>
> (a) the difference between the exempted value of property described in subsection (2), referred to in this subsection as the "original property", and the market value at the time of the trial of the original property or property acquired
>
> (i) as a result of an exchange for the original property, or
>
> (ii) from the proceeds, whether direct or indirect, of a disposition of the original property;

[90] This provision governs the division of the increase in value of exempt property. The reference to "market value at the time of trial" should be amended. The phrase "time of trial" should be replaced with the phrase "time of valuation."

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[71] *Hodgson* at paras 12-16.

b. Section 10(3)

[91] Section 10(3) deals with valuing matrimonial assets that have been wrongfully transferred to a third party and refers to the time of trial:

> **Return of gift or property when insufficient consideration**
>
> (3) For the purposes of this section, the value of the property transferred or the gift shall be the market value at the time of trial.

[92] If the MPA is amended to specify that valuation is to be done at the date of separation, the value of all matrimonial assets will be locked in at the separation amount. If one asset is then transferred and a section 10 application is brought, the Court will also consider the value of the asset as of the date of the application or trial of that issue. If the asset has increased by the time of the application, then the Court may decide to distribute that increase equally, or allocate it entirely to one spouse (likely, the spouse who did not conduct the wrongful transfer). If the asset has decreased, the Court may decide to distribute the decrease equally. Or, the Court may cause the spouse who wrongfully transferred the asset to bear the entire burden of the decrease by requiring him or her to pay the other spouse half of the higher value (i.e., the separation value).

[93] In either case, the section 10(3) instruction to value the wrongfully transferred asset at the time of trial does not contradict the changes to valuation date proposed in this Report. Rather, it allows the Court to effect a fair and proper distribution by considering how much the value of the wrongfully transferred asset has changed since the date of valuation.

8. TRANSITION AND COMING INTO FORCE

[94] If the recommended amendments are implemented, the question of transition must be addressed. For example, what should happen if the spouses separate while the current legislation is still in force, but property division is finalized after the amendments are implemented?

[95] Altering the default valuation date under the MPA would be considered a substantive change; therefore, it is appropriate to provide a transition period. However, most individuals already believe that valuation is done at separation. Further, most family law practitioners will be aware of the impending change, given the extensive consultation conducted by ALRI. Thus, a lengthy transition period is not required. Rather, a short transition period of a few months will allow sufficient time to educate divorcing couples and family law practitioners

about the change in the law. The time between Royal Assent and Proclamation would allow for sufficient education. Therefore, it is ALRI's view that the amendments should come into force on Proclamation.

[96] Aside from coming into force, there is a separate question of couples to whom the new valuation date should apply. Such rules should be crafted to reduce situations where couples might rush to separate before the change is implemented. Further, any rule should give due consideration to couples who have set their matter down for trial before the amendments come into force. These couples have relied on the old valuation date and expended extraordinary resources gathering valuation reports to be used at their upcoming trial. It would be unfair to impose a different valuation date on them at such a late point in the process.

[97] Therefore, any couple who has set their matter down for trial before the amendments come into force should be governed by the old law; namely, the default valuation date as at the date of trial. Setting a matter down for trial may be accomplished by filing Form 37, in accordance with Rule 8.4, or by making an application, pursuant to Rule 8.5, for a judge to schedule a trial date.[72]

[98] Any couple who separates after the amendments come into force, or who separates before that date but has not filed Form 37 or had their matter set down for trial by court order, should be governed by the new law. In other words, separation as the default valuation date will apply to any couple who has not set their matter down for trial before the amendments come into force, regardless of when they separated.

[99] Draft transition provisions have been included in the sample draft amendments, attached as an Appendix.

RECOMMENDATION 5

The proposed amendments to the *Matrimonial Property Act* should come into force on Proclamation.

RECOMMENDATION 6

Valuation as at the date of trial should continue to govern couples who have set their matter down for trial before the amendments come into force.

[72] *Alberta Rules of Court*, Alta Reg 124/2010, ss 8.4-8.5.

CHAPTER 3

Post-valuation Changes

[100] Regardless of when property is valued, changes in value or in the pool of property post-valuation may lead to disputes for which the spouses seek court resolution. The changes may be due to the actions of one or both spouses or to market forces. The time difference since valuation may be relatively short or may be a span of years or even decades. Presuming that changes in the value of matrimonial property between separation and trial are to be shared seems appropriate when the change in value is due to forces outside the spouses' control, such as market conditions or a natural disaster.[73] However, such sharing may not be appropriate in other circumstances such as when, between separation and trial, the value of a matrimonial asset increases due to the labours of one spouse, or plummets as a result of one spouse's mismanagement. Given the variability in the circumstances, how best can the court retain flexibility to respond to property changes in appropriate circumstances?[74]

A. Accommodating Changes by Rebuttable Presumption

[101] There are two options for the format of an express valuation date provision. While *Hodgson* provides that valuation date is a rule, it was previously thought to be a rebuttable presumption. As post-*Hodgson* cases have shown, a strict rule may be less able to accommodate changes in property value.

[102] Despite the Court of Appeal's determination that valuation as of trial is a rule, not all lower courts have followed this rule. In some cases, courts have determined the value of matrimonial property as of another date. See, for example:

- *Repas v Repas* (2012): The Court valued and divided the husband's business property as of separation. The Court held that it would not be just and equitable to order an equal division of the business property

[73] During discussion at the seminars, many participants used the floods in Southern Alberta that occurred during the summer of 2013 as an example of a post-separation circumstance that the court should be able to consider when valuing matrimonial property.

[74] A method for responding to post-valuation changes received substantial support at all consultation events. For example, the Family Law Steering Committee's support for setting the default valuation date at the date of separation was made contingent on the existence of a mechanism to respond to post-valuation changes: "The majority of the Committee favors the date of separation for valuation, provided that there is enough flexibility, through the use of section 8 factors, to adjust that date if the circumstances warrant."

as of the date of trial because "there was a real imbalance in contribution after separation." Unusual circumstances in this case included that the spouses had lived separate and apart for 19 years, and that the husband passed away approximately four years before the court's decision was issued.[75]

- *Mancini v Phelan* (2012): The Court valued many of the matrimonial assets as of a date agreed to by the spouses through their counsel.[76]
- *Yassa v Parker* (2012): Matrimonial property was valued and distributed as of separation. The Court held that valuing the property as of trial would have been unjust in light of the spouses' financial behaviour. Within a few years of separation the spouses had separated their accounts, collapsed their RRSPs, sold their matrimonial home, and both spouses had become indebted to their respective families.[77]
- *Holland v Holland* (2011): The spouses' RRSP and pension were valued and divided as of separation. After separation, neither spouse contributed to the growth of these assets for the other's benefit. Only the matrimonial home was valued and divided as of trial.[78]
- *Mew v Mew* (2011): The spouses' assets were no longer available to be divided as of trial. The spouses had divided their monetary assets, and sold their home and divided the equity in it. The Court did not alter the division reached by the spouses. The Court noted that trying to strictly follow *Hodgson* under these circumstances would result in a "futile exercise in calculation" that would involve tracing matrimonial property over a nine-year period.[79]
- *JJM v CDM (Estate)* (2008): The husband's company was valued and divided as of separation. The Court noted that after separation, the wife's conduct was of no benefit to the acquisition or maintenance of the property and was a detriment to the family. The wife had

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[75] *Repas v Repas*, 2012 ABQB 572 at para 47. The remaining matrimonial property was valued as of trial.

[76] *Mancini v Phelan*, 2012 ABQB 536 at para 29. Remaining matrimonial property was valued as of trial – see para 30.

[77] *Yassa v Parker*, 2012 ABQB 167 at para 97. Given the steps taken by the spouses to live financially independently of each other since trial, the Court refused to divide their debts as of trial – see paras 94–95.

[78] *Holland v Holland*, 2011 ABQB 359 at paras 67–70. The Court also noted that any change in the value of the matrimonial home since separation was the result of market forces rather than ongoing contributions by the spouses.

[79] *Mew v Mew*, 2011 ABQB 531 at paras 35–41.

> difficulties with drug and alcohol addiction, was in and out of hospitals and treatment centres, and caused significant family stress. She passed away prior to the trial.[80]

[103] These cases show that articulating the valuation date as a presumption could be advantageous. It would enable courts to exercise more discretion to ensure that property is valued and divided fairly and thereby respond to circumstances on a case by case basis.[81] For example, if a significant period of time had elapsed between separation and trial, as was the case in *Hodgson*, valuation at trial may be more appropriate.

[104] However, if the MPA were to articulate the valuation date as a rebuttable presumption, some predictability and certainty may be lost. This result would undermine a primary advantage of using a single valuation date for all property. As before *Hodgson*, it would be open to argue about when valuation should take place and what property should be valued.[82]

[105] Setting out a rebuttable presumption would also mean addressing the circumstances in which the presumptive valuation date could be rebutted. Issues such as whether the MPA should specify what date or dates should be used to value property if the presumptive valuation date is rebutted, and whether it would be possible to rebut a valuation date agreed to between the parties would also need to be addressed. Even with such guidance, the valuation date may be subject to varying, or even conflicting, judicial interpretations. Costs would also increase if the presumptive valuation date were rebutted and the property had to be valued again.

[106] The majority of survey respondents agreed that a rebuttable presumption would be expensive to litigate and would represent too high of a hurdle for those without significant resources. For instance, according to one survey participant:

> Making the valuation date a rebuttable presumption is too high a hurdle for the less well-off spouse to get past...A rebuttable presumption is a complex question to litigate and most people on any kind of budget won't go there.

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[80] *JJM v CDM (Estate)*, 2008 ABQB 116 at para 99.

[81] Background Paper at para 2. See also para 51.

[82] Background Paper at para 49.

B. Accommodating Changes under Section 8

[107] Changes could also be accommodated following the model set out in *Hodgson*. As held in *Hodgson*, if property may only be valued as of one date, the factors in section 8 can be used to address any unfairness that might arise. The majority of survey participants favoured this approach.[83]

[108] As noted earlier, the factors in section 8 allow the court to make an unequal distribution of section 7(4) matrimonial property and section 7(3) increases in value of exempt property where it would be just and equitable to do so. For ease of reference, section 8 provides:

> **Matters to be considered**
>
> **8** The matters to be taken into consideration in making a distribution under section 7 are the following:
>
> (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;
>
> (c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;
>
> (d) the income, earning capacity, liabilities, obligations, property and other financial resources
>
> (i) that each spouse had at the time of marriage, and
>
> (ii) that each spouse has at the time of the trial;
>
> (e) the duration of the marriage;

[83] 83.8% of survey participants agreed that the section 8 factors are the best way to respond to post-valuation changes. Of the eleven written submissions submitted to ALRI, four commented specifically on this issue. One submission vehemently disagreed with utilizing section 8 to address post-valuation changes, and one agreed that section 8 would provide enough flexibility to adjust the valuation date if the circumstances warrant. The third submission felt that additional section 8 factors would need to be added to address separation as the applicable valuation date, and the final submission preferred a rebuttable presumption.

(f) whether the property was acquired when the spouses were living separate and apart;

(g) the terms of an oral or written agreement between the spouses;

(h) that a spouse has made

(i) a substantial gift of property to a third party, or

(ii) a transfer of property to a third party other than a bona fide purchaser for value;

(i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;

(j) a prior order made by a court;

(k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;

(l) that a spouse has dissipated property to the detriment of the other spouse;

(m) any fact or circumstance that is relevant.

[109] Is section 8 adequate to accommodate a legislative change to adopt separation as the default valuation date? A minority of survey participants felt that the answer is no.[84] The strongest opposition to using section 8 is that it will undermine the certainty and predictability that should accompany the concept of valuation date. This could result in an increase in litigation.

[110] Further, the operation of section 8 itself is unpredictable. It provides wide discretion to the Court to consider virtually any aspect of the parties' relationship, which further undermines certainty.

[111] There is also some concern surrounding judicial attitudes towards section 8. Practitioners feel that the Court is extremely reluctant to undertake a section 8 analysis and will avoid doing so except in the most extreme circumstances. If this is accurate, then section 8 may not be a meaningful tool for situations where post-valuation changes need to be addressed. Additionally, some practitioners feel that it becomes very expensive to argue section 8 properly. As such, many clients may opt not to make the argument because of the expense involved.

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[84] 16.2% of survey participants disagreed with the section 8 approach, preferring the option of a rebuttable presumption. As noted above, one out of the four written submissions provided on this issue preferred a rebuttable presumption.

Again, if this is true, then section 8 relief may be illusory to the majority of people involved in matrimonial property disputes.

[112] However, as noted earlier, the majority of survey participants felt that section 8 did provide the appropriate flexibility to be able to respond to post-valuation changes. Section 8 is already framed to allow the court to resolve disputes. The factors permit the court to look back at the entirety of the marriage, i.e. to both pre- and post-separation conduct. While there would be an adjustment period were the valuation date to be moved from trial to separation, the transition would likely be fairly smooth. Indeed, from the post-*Hodgson* cases noted in paragraph [102], courts are already applying this approach when necessary, though perhaps not expressly on the basis of a section 8 analysis.

[113] A further advantage to accommodating changes under section 8 is that the jurisprudence in this area is familiar. As noted earlier, expressing the valuation date as a rebuttable presumption would require a statement of when and how the presumption is rebutted. Achieving a just and equitable distribution taking into account the section 8 factors is a familiar process and, in all likelihood, achieves the same result as rebutting a presumptive valuation date.

[114] On balance ALRI considers that the factors in section 8 provide the appropriate flexibility to respond to post valuation property changes. As discussed above, Hodgson ruled out the option of making the valuation date a rebuttable presumption. Further, any proposal of a rebuttable presumption requires a consideration of when the presumption is rebutted and what is to happen if the presumption is rebutted.

[115] In comparison, section 8 already sets out a broad range of well-known factors with established jurisprudence for when courts deem it appropriate to consider variations to the division of property.[85]

RECOMMENDATION 7

Flexibility to respond to post-valuation property changes is best achieved by applying the factors in section 8 of *the Matrimonial Property Act*.

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[85] See Jonette Watson Hamilton & Annie Voss-Altman, *The Matrimonial Property Act: A Case Law Review*, Research Paper (2010) at 63–72, online: Alberta Law Reform Institute <www.alri.ualberta.ca/docs/OP MPA Case Law.pdf>.

C. Should the Factors in Section 8 be Adjusted to Reflect Valuation at Separation?

1. POSSIBLE FACTORS

[116] Many survey participants felt that section 8 would need to be clarified, or further factors would need to be added in order to reflect the fact that the default valuation date has been moved to separation. For example, one participant queried whether an unwise, post-separation investment by one party in good faith should be considered when distributing matrimonial property? Or, should the parties be presumptively entitled to any increase in the value of an asset (such as the matrimonial home) if they have both been contributing to it, but it will ultimately be retained by only one spouse?

[117] A review of matrimonial property statutes from other Canadian jurisdictions reveals additional factors that could be incorporated into section 8 of the MPA. A full list of additional factors from other jurisdictions is provided below:[86]

- How long the parties have been living separate and apart.[87]
- The length of time the spouses cohabited, both before and during the marriage.[88]
- The duration of the relationship.[89]
- The date on which the property was acquired.[90]
- The nature of the asset.[91]
- The valuation date.[92]

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[86] With the exception of British Columbia, all of the following factors come from jurisdictions that value property as of the date separation.

[87] Yukon Act, s 13(c); *Family Property Act*, CCSM, c F25, s 14(2)(e) [Manitoba Act]; Saskatchewan Act, s 21(3)(c).

[88] Manitoba Act, s 14(2)(d); Saskatchewan Act, s 21(3)(b).

[89] *Family Law Act*, SBC 2011, c 25, s 95(2)(a) [BC Act].

[90] Yukon Act, s 13(d); Saskatchewan Act, s 21(3)(d).

[91] Manitoba Act, s 14(2)(g).

[92] Yukon Act, s 13(g). The valuation date in the Yukon is the earliest of the following dates: date of separation, date of divorce or declaration of nullity, or date an application to prevent an improvident depletion of assets is commenced. See Yukon Act, ss 15(3) and 6(2).

- A substantial post-valuation change in property and the circumstances of the change.[93]
- A substantial debt or other liability that reduces the net value of the family property, or a substantial loss incurred as a result of the disposition of family property, and the circumstances of the decrease or loss.[94]
- Whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends.[95]
- A spouse's failure to disclose debts or other liabilities existing at the date of the marriage.[96]
- Debts that were incurred recklessly or in bad faith.[97]
- Interests of third parties in the family property.[98]
- The needs of the children of the marriage, if any, and any financial responsibility related to the care and upbringing of the children[99]
- Any maintenance payments payable for the support of a child.[100]
- A spouse's contribution to the career or the career potential of the other spouse.[101]
- Whether family debt was incurred in the normal course of the relationship between the spouses.[102]
- If the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt.[103]

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[93] *Family Law Act*, SNWT 1997, c 18, s 36(6)(h) [NWT Act]; *Family Law Act*, SNWT 1997 (Nu), c 18, s 36(6)(h) [Nunavut Act].

[94] NWT Act, note 93, s 36(6)(i); Nunavut Act, note 93, s 36(6)(i).

[95] BC Act, s 95(2)(f).

[96] Ontario Act, s 4(6)(a); PEI Act, s 6(5)(a).

[97] Ontario Act, s 4(6)(b); PEI Act, s 6(5)(b).

[98] Saskatchewan Act, s 21(3)(n).

[99] NWT Act, note 93, s 36(6)(g); Nunavut Act, note 93, s 36(6)(g).

[100] Saskatchewan Act, s 21(3)(m).

[101] BC Act, s 95(2)(c); Saskatchewan Act, s 21(3)(f).

[102] BC Act, s 95(2)(d).

[103] BC Act, s 95(2)(e).

- The extent to which one spouse's financial means and earning capacity has been affected by the responsibilities and other circumstances of the relationship, but only if the spousal support objectives have not been met.[104]
- The fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family.[105]
- The equalization payment would be grossly unfair or unconscionable, having regard to any extraordinary financial or other circumstances of the parties or the extraordinary nature or value of any of their assets.[106]
- Whether either spouse owns assets of an extraordinary value which were acquired by gift or inheritance and to which the matrimonial property legislation does not apply.[107]
- Any benefit received or receivable by the surviving spouse as a result of the death of the other spouse.[108]

[118] In ALRI's view, only one additional factor is necessary to address separation as the new default valuation date. In particular, there should be a factor that expressly allows consideration of any changes in value that have occurred post-separation. It is ALRI's position that the following factor should be inserted into section 8:

- Whether there has been any substantial change in the value of matrimonial property following the date on which the spouses began to live separate and apart and the circumstances of that change.

[119] This factor directly addresses post-separation changes in value. Further, including the circumstances of the change will allow consideration of whether the increase or decrease in value can be attributed to the efforts or mismanagement of one spouse, or whether it is attributable only to market fluctuations. In the latter case, it may be equitable to distribute the change in

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[104] BC Act, s 95(3). The spousal support objectives in section 161 of the BC Act mirror those found in the *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 15.2(6).

[105] Ontario Act, s 4(6)(f); PEI Act, s 6(5)(f).

[106] Manitoba Act, s 14(1).

[107] Manitoba Act, s 14(2)(f).

[108] Saskatchewan Act, s 21(3)(l).

value equally between the parties. However, an equal distribution of the changed asset may not be equitable in the former case.

[120] A further consideration is whether spouses who agree on a valuation date may use section 8 to address any post-agreement changes in value. In ALRI's view, it is inappropriate for spouses to use section 8 to alter an agreement. An agreement negotiated with the benefit of independent legal advice should not be easily disturbed. If the spouses feel that post-agreement changes in value should be taken into account, they are free to agree on a different date or adjust the ultimate division and distribution of assets. Further, in appropriate circumstances, a spouse may use basic contract principles, such as undue influence, to challenge the agreement.

[121] Thus, it is ALRI's position that spouses who make an agreement confined to valuation date should not be permitted to use section 8 to address any substantial post-agreement changes in value.

RECOMMENDATION 8

Section 8 of the *Matrimonial Property Act* should be amended to include a factor that addresses whether there has been any substantial change in the value of matrimonial property following the date on which the spouses began to live separate and apart and the circumstances of that change.

2. CONSEQUENTIAL AMENDMENTS

[122] A further consideration is whether section 8(d)(ii) of the MPA needs to be amended in light of ALRI's recommendation on valuation date. Section 8(d)(ii) requires the Court to consider the property and other resources that each spouse has at the time of trial. In *Hodgson*, the Court of Appeal stated that this provision "comes close to being a statement of legislative intent that the date for the valuation and division of matrimonial property should be the date of trial."[109]

[123] However, this statement was based on the fact that the MPA had no express legislative statement regarding valuation date. The Court in *Hodgson* had to imply the correct date by reading and interpreting the MPA. If the MPA is amended to reflect the changes to valuation date recommended in this Report, section 8(d)(ii) will be read in that context and should pose no problem. Further,

[109] *Hodgson* at para 16.

section 8 is only considered by the Court if the property matter proceeds to trial. The reference in section 8(d)(ii) to the date of trial simply indicates when the matter comes before the Court; it would not override an express provision establishing that the default valuation date is the date of separation.

[124] Nevertheless, if the MPA is amended, due weight must be given to that change. Moreover, section 8(d) should reflect the reality of why section 8 is now in play, i.e. a post-valuation change in the value of matrimonial assets. In ALRI's view, any reference to a specific date at which the court may consider the property and other resources of each spouse should be eliminated. Allowing consideration of the resources that each spouse has at any point in time empowers the Court to look at each spouse's economic position throughout the entire relationship. Therefore, it is ALRI's position that section 8(d) should be amended to eliminate any reference to a specific date. Rather, section 8(d) should allow the Court to consider the property and other resources that each spouse has at any time during the relationship.

RECOMMENDATION 9

Section 8(d) of the *Matrimonial Property Act* should be amended to eliminate any reference to a specific date.

RECOMMENDATION 10

Section 8(d) of the *Matrimonial Property Act* should allow the Court to consider the income, earning capacity, liabilities, obligations, property, and other financial resources that each spouse has at any time during the relationship.

3. COMING INTO FORCE

[125] The transition provisions regarding the proposed amendments to section 8 should mirror the transition provisions on valuation date. That is, the section 8 amendments should come into force on Proclamation. This will provide enough time to educate divorcing couples and family law practitioners about the impending change. Further, the amendments to section 8 should apply to couples who have not set their matter down for trial before the legislation comes into force. Any couple who has set their matter down for trial before the amendments come into force should be governed by the current version of section 8.

D. Conclusion

[126] To reflect the current party-driven, settlement focus of matrimonial property law, the MPA needs to be updated in certain key respects. The MPA should expressly provide that spouses may agree on a valuation date. This will serve an educational purpose by alerting lawyers, clients and self-represented litigants to the possibility of agreeing on a valuation date. An agreement will reduce cost and delay, and allow the spouses to pinpoint the end of their economic partnership. It may also encourage further settlement on all property-related issues.

[127] In terms of a default valuation date, Alberta case law demonstrates that valuing property as at the date of trial is problematic. It is an uncertain future date, assumes spouses will litigate to trial, and discourages earlier party-driven settlements.

[128] In contrast, valuing matrimonial property as at the date of separation should facilitate settlement, reduce cost and delay, and allow decisions to be made on the basis of more accurate information. Therefore, this report recommends that the MPA should expressly provide that, if spouses cannot agree on a valuation date, matrimonial property should be valued as at the date of separation.

Finally, there will be circumstances where parties must address property changes that occur following valuation but prior to distribution. Flexibility to respond to these post-valuation changes can best be achieved through recourse to the factors found in section 8 of the MPA. However, to reflect separation as the default valuation date, the section 8 factors should be adjusted to allow consideration of any post-valuation changes in value and the circumstances of the change.

HON CD GARDNER (Chair)

MT DUCKETT QC (Vice Chair)

ND BANKES

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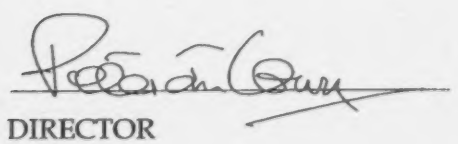
ND STEED QC

CHAIR



DIRECTOR

APPENDIX

Sample Draft Amendments to the *Matrimonial Property Act*

A sample of the suggested draft amendments, with the additional text in bold, are set out below. The following changes have been made:

- A definition of "valuation" has been added;
- Section 8(d) has been clarified;
- An additional factor has been added as section 8(g.1);
- Express provisions regarding the ability to agree on a valuation date have been added as sections 36.1 and 36.2;
- The consequential amendments to sections 7(3)(a) and 10(3) have been incorporated; and.
- The transition provisions have been included.

Definitions

1(1) In this Act,

(a) "Court" means the Court of Queen's Bench;

(b) "household goods" means personal property

(i) that is owned by one or both spouses, and

(ii) that was ordinarily used or enjoyed by one or both spouses or one or more of the children residing in the matrimonial home, for transportation, household, educational, recreational, social or esthetic purposes;

(c) "matrimonial home" means property

(i) that is owned or leased by one or both spouses,

(ii) that is or has been occupied by the spouses as their family home, and

(iii) that is

(A) a house, or part of a house, that is a self-contained dwelling unit,

(B) part of business premises used as living accommodation,

(C) a mobile home,

(D) a residential unit as defined in the Condominium Property Act, or

(E) a suite;

(d) "matrimonial property order" means a distribution by the Court under section 7 and an order under section 9;

(e) "spouse" includes a former spouse and a party to a marriage notwithstanding that the marriage is void or voidable;

(f) "valuation" means

(i) the date set by the spouses in an agreement that is enforceable under sections 36.1 and 36.2; or,

(ii) if the spouses cannot agree, the date on which the spouses began living separate and apart.

(2) Subsection 1(f)(ii) does not apply to any spouse who, before the date on which subsection 1(f)(ii) comes into force, has

(a) filed Form 37, or

(b) had their matrimonial property matter set down for trial by a judge.

Distribution of Property

7(1) The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.

(2) If the property is

(a) property acquired by a spouse by gift from a third party,

(b) property acquired by a spouse by inheritance,

(c) property acquired by a spouse before the marriage,

(d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or

(e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,

the market value of that property at the time of marriage or on the date on which the property was acquired by the spouse, whichever is later, is exempted from a distribution under this section.

(3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:

(a) the difference between the exempted value of property described in subsection (2), referred to in this subsection as the "original property", and the market value at the **time of valuation** of the original property or property acquired

(i) as a result of an exchange for the original property, or

(ii) from the proceeds, whether direct or indirect, of a disposition of the original property;

(4) If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

Matters to be considered

8 The matters to be taken into consideration in making a distribution under section 7 are the following:

(a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

(b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;

(c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;

(d) the income, earning capacity, liabilities, obligations, property and other financial resources **that each spouse has;**

(e) the duration of the marriage;

(f) whether the property was acquired when the spouses were living separate and apart;

(g) the terms of an oral or written agreement between the spouses;

(g.1) whether there has been any substantial change in the value of matrimonial property following the date on which the spouses began to live separate and apart and the circumstances of that change;

(h) that a spouse has made

(i) a substantial gift of property to a third party, or

(ii) a transfer of property to a third party other than a bona fide purchaser for value;

(i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;

(j) a prior order made by a court;

(k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;

(l) that a spouse has dissipated property to the detriment of the other spouse;

(m) any fact or circumstance that is relevant.

Agreement on valuation date

36.1(1) The spouses may agree on a date for valuation, provided the spouses have entered into a written agreement with each other that is enforceable under section 36.2.

(2) An agreement under subsection (1) may be incorporated into an agreement under section 37.

(3) An agreement under subsection (1) may be entered into by 2 persons in contemplation of their marriage to each other but is not enforceable until after the marriage.

(4) An agreement under subsection (1)

(a) may provide for the valuation of property at any time including, but not limited to, the time the spouses began living separate and apart or the dissolution of the marriage, and

(b) may apply to property owned by both spouses and by each of them at or after the time the agreement is made.

(5) An agreement under subsection (1) is not enforceable by a spouse if that spouse, at the time the agreement was made, knew or had reason to believe that the marriage was void.

Formal requirements for agreement on valuation date

36.2(1) An agreement referred to in section 36.1 is enforceable if each spouse or each person, in the case of persons referred to in section 36.1(3), has acknowledged, in writing, apart from the other spouse or person

(a) that the spouse or person is aware of the nature and the effect of the agreement, and

(b) that the spouse or person is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person.

(2) The acknowledgement referred to in subsection (1) shall be made before a lawyer other than the lawyer acting for the other spouse or person or before whom the acknowledgement is made by the other spouse or person.

Agreements between spouses

37(1) Part 1 does not apply to property that is owned by either or both spouses or that may be acquired by either or both of them, if, in respect of that property, the spouses have entered into a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property.

(2) An agreement under subsection (1) may be entered into by 2 persons in contemplation of their marriage to each other but is unenforceable until after the marriage.

(3) An agreement under subsection (1)

(a) may provide for the distribution of property between the spouses at any time including, but not limited to, the time of separation of the spouses or the dissolution of the marriage, and

(b) may apply to property owned by both spouses and by each of them at or after the time the agreement is made.

(4) An agreement under subsection (1) is unenforceable by a spouse if spouse, at the time the agreement was made, knew or had reason to believe that the marriage was void.

Formal requirements for agreement

38(1) An agreement referred to in section 37 is enforceable if each spouse or each person, in the case of persons referred to in section 37(2), has acknowledged, in writing, apart from the other spouse or person

(a) that the spouse or person is aware of the nature and the effect of the agreement,

(b) that the spouse or person is aware of the possible future claims to property the spouse or person may have under this Act and that the spouse or person intends to give up these claims to the extent necessary to give effect to the agreement, and

(c) that the spouse or person is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person.

(2) The acknowledgement referred to in subsection (1) shall be made before a lawyer other than the lawyer acting for the other spouse or person or before whom the acknowledgement is made by the other spouse or person.